IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO MOTION TO AFFIRM

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As Appellants' Jurisdictional Statement points out, this case is the first to come before this Court in which an entire form of local government, not merely the manner of its election, has been struck down by the Federal Courts under the constitutional rubric of "dilution" of black votes. It is also the first case to require this Court to decide whether "relevant constitutional distinctions may be drawn in this [dilution] area between a state legislature and a municipal government." *Wise v. Lipscomb*, ___ U.S. ___, 46 U.S.L.W. 4777, 4780 (June 22, 1978) (separate opinion). This aspect of *Lipscomb* was not addressed in Appellees'

Motion to Affirm (August 3, 1978). This Court cannot dispose of this case properly without evaluating the distinction between state governments and local governments, adumbrated in *Lipscomb*.

The dilution rule made applicable to state legislative elections by *White v. Regester*, 412 U.S. 755, should not be carelessly transplanted into the local government context. There are a host of salient differences and reasons militating more greatly in favor of municipal at-large electoral systems, several of which are highlighted in this litigation.

The essence of a state legislature is the representation of geographically narrow constituencies in the formulation of broad, statewide policy. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166. The generality of the policy declaration, and the absence of a need for implementation by the legislature, make the state legislature perfectly adapted to continual reapportionment and coalition politics. Intervention by Federal Courts to rearrange the constituencies of the individual members of the legislative collective, when the Constitution requires, causes no undue dislocation in the duties or operation of the legislative institution.

This is not always the case, however, with the local governments which implement the broad statewide policy. It is especially not the case where the Federal Court's remedy changes not only constituency but the very form of the local government, as does the remedy in this case.

Fundamentally, the central purpose served by at-large elections is more important to local governing boards than to state legislatures. Thus, it has been observed:

> "[T]he purposes served by multimember districts are less apparent in *Regester* than in *Zimmer*.[4] The districtwide perspective and allegiance which result from representatives being elected at-large, and which enhance their ability to deal with districtwide problems, would seem more useful in a public body with responsibility only for the district than in a statewide legislature." *Note*, 87 Harv. L. Rev. 1851, 1857 (1974).

[1]In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, the Fifth Circuit extrapolated from *Regester* and extended the dilution rule to local governments. This Court affirmed "without approval of the constitutional views" enunciated by the Fifth Circuit. 424 U.S. at 638.

(continued)

It is consistent with this analysis that use of multimember districts in state legislative apportionment has long been on the decline.[2] Silva, *Compared Values Of The Single- And The Multi-Member Legislative District*, 17 West. Polit. Q. 504-505 (1964); Dixon & Hatheway, *The Seminal Issue In State Constitutional Revision: Reapportionment Method And Standards*, 10 Wm. & Mary L. Rev. 888, 903 (1969). With respect to city government, exactly the opposite is true. The proportion of cities using at-large elections has grown markedly since the turn of the century and from 53 percent in 1940 to 62 percent in the middle 1960's to more than 67 percent in 1972. Jewell, *Local Systems of Representation:*

(footnote continued from preceding page)

[2]The autonomy of most local governments being limited by State law, councils and commissions often must seek approval of their decisions in the State legislatures. The City of Mobile, for example, does not have home rule under Alabama law. The District Court below took notice of the local legislation procedures employed in the Alabama legislature, which consists of a 35 single-member districted Senate and a 105 single-member districted House.

Thus, in a real sense, policy for the City of Mobile is made by a combination of the best of both patterns: single-member districts for the supervisory State legislature, and commission form, necessarily at-large, for the city government.

In this way, the distinctions perceived in *Lipscomb, supra*, can coexist.

Political Consequences And Judicial Choices, 36 Geo. Wash. L. Rev. 790, 799 (1968); International City Management Association, *Municipal Year Book* Table 3/15 (1972).

Much of the impetus of this trend is undoubtedly provided by adoptions of the two reform models of local government: the commission form and its successor, council-manager. Aside from the shared premise of at-large elections, the common ground of these two forms is non-partisan elections[3] — another extremely important distinction from the state legislative circumstance confronting the Court in *Regester.* Where parties determine who may run for office, there is a potential for the exclusion of minority-supported candidates from the ballot which cancels out or minimizes minority voting strength.

That potential for exclusion is removed where elections are truly non-partisan and where no other white-dominated interest groups control the slating process. While there are some only nominally non-partisan cities where candidates are nevertheless supported by political parties or by various influential groups, it is most common for a "free for all" pattern to prevail, in which neither parties nor slates of candidates are important. C. Adrian & C. Press, *Governing Urban America* 99-100 (4th Ed. 1972); R. Lineberry & I. Sharkansky, *Urban Politics and Public Policy* 88 (1971).

In Mobile, parties play no role, and there is but one important slating organization — a black group which endorsed each of the winners in the last contested city elections. (J.S. 10-12). In such a situation, it is an absolute

[3]The great majority (76 per cent) of city governments in the country are non-partisan. Only the mayor-council form, decreed by the District Court below, shows a substantial percentage (36 per cent) of partisan electoral systems. International City Management Association, *Municipal Year Book* 69 (1976).

imperative that, as Appellees concede, all "candidates actively seek black votes as well as white votes. . ." (Motion to Affirm at 6).

Political scientists concur that the most outstanding feature of the commission form is the dual role of the commissioners — each of them serves individually as the head of an executive department while collectively they serve as the policy-making council for the city. In other words, unlike the various mayor-council structures and unlike any state governmental scheme, there is no separation of powers.

The theory, and in Mobile, the practice[4] of this is that the real implementer of policy is directly and immediately accessible to citizens with input or complaints about the performance of city government. There are no intermediate steps. The legislator is not compelled to do extensive casework to locate and persuade the responsible administrator of the value of his constituent's message. Whereas in a state legislature single-member districts may be necessary to make constituencies small enough so that all the casework can be done, the very structure of Mobile's government is designed to address that need.

The council-manager form is based on an almost antithetical idea of complete insulation of the manager from electoral politics. Appellants do not argue that one or the other is best for all times and all communities, only that each serves important policy considerations and has characteristics quite distinct from the state legislative scenario. Both reform models depend on at-large elections, which

[4]The testimony of Plaintiffs' own witnesses established that one or more Commissioners were personally available to hear black citizens' needs and grievances, and that this access had tangible impact on city government performance. (Tr. 433-34, 572-73, 583, 621-25).

under the law of this case (a rule purportedly derived from the principles set down in *Regester*) are unconstitutional in any city where racially polarized voting is found from an abstruse statistical demonstation and blacks are not numerous enough to elect blacks to office.

Probable jurisdiction should be noted.

Respectfully submitted,

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